BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTORIA ACOSTA	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,691
NATIONAL BEEF PACKING COMPANY, LP	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	
	)	

ORDER

Respondent and its insurance carrier appealed the Award dated March 19, 1998, entered by then Assistant Director Brad E. Avery. The Appeals Board heard oral argument on December 21, 1998.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for the claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, in its submission letter filed with the Division in June 1997, respondent and its insurance carrier stipulated to an average weekly wage of $504.75.

ISSUES

This is a claim for a September 8, 1995 accident. After finding that respondent terminated claimant either because of her injuries or because she filed a workers compensation claim, the Assistant Director found that claimant was entitled to a 78.5 percent permanent partial general disability.

Respondent and its insurance carrier contend the Assistant Director erred. First, they contend that claimant was fired because she violated the company's attendance policy rather than because of her injuries or workers' compensation claim. Second, if the Appeals Board finds that claimant is entitled to a permanent partial general disability that exceeds the functional impairment rating, the respondent and insurance carrier contend that claimant has failed to make a good faith effort to find appropriate employment and, therefore, claimant has failed to prove any wage loss for purposes of the permanent partial general disability formula.

Because of the average weekly wage stipulation, the only issue on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Victoria Acosta began working for National Beef in Dodge City in January 1994. Although this was her first job, she falsely stated in her employment application that she had previously worked at a meat packing plant in Nebraska and at a local fast food restaurant. She falsified her application as she thought it would help her chances to be hired.

(2) On September 8, 1995, Ms. Acosta injured her right arm, shoulder, and neck when her frock caught on a machine jerking her right upper extremity. The parties stipulated that the accident arose out of and in the course of employment.

(3) A supervisor witnessed the accident and immediately took Ms. Acosta to the plant's medical dispensary where she saw a nurse.

(4) The accident occurred on Friday. On Monday, September 11, 1995, Ms. Acosta called in and left a message on the company's answering machine that she could not work. On Tuesday, September 12, 1995, Ms. Acosta also called in to report that she could not work. But, according to company rules, that call was late. Because Ms. Acosta's electricity had gone off during the night, the alarm clock did not wake her at the appropriate time. Company rules require employees to call at least 30 minutes before their shift begins. Rather than calling before 5:30 a.m. as required, Ms. Acosta called at approximately 5:50 a.m.

(5) On September 12, 1995, Ms. Acosta consulted her personal physician who took her off work for three days. On September 13, 14 and 15, 1995, Ms. Acosta called the company and reported that she could not work.

(6) When she returned to work on Saturday, September 16, 1995, the company gave Ms. Acosta three written warnings. First, the company warned her about seeing her personal physician instead of the company doctor. The warning stated that she would be fired for additional violations of that rule. In the other warnings, the company threatened to fire Ms. Acosta for calling in late on both September 12 and 13. She acknowledged the late call on September 12 and signed that written warning. Ms. Acosta denies that she called in late on the 13th. Because she disagreed with the other two warnings, she did not sign them.

(7) Ms. Acosta first saw the company physician on September 21, 1995. The doctor prescribed physical therapy but did not restrict her from performing her regular job operating the cryovac machine. But because of the pain that she was experiencing, Ms. Acosta performed her job with her left arm only. She then began to experience left shoulder and neck symptoms. After reporting those additional symptoms to the company doctor, he prescribed physical therapy for the left shoulder also.

(8) While working with her left arm only, Ms. Acosta struggled to keep up with production. Her supervisor threatened to replace her. On October 3, 1995, the company gave Ms. Acosta a written warning for poor job performance. That warning also reminded Ms. Acosta that she could be terminated for any additional insubordination. Ms. Acosta testified that she had previously been cited for insubordination for failing to perform a job that made her dizzy. At that time, according to Ms. Acosta, she was pregnant with a baby that she later lost.

(9) On October 23, 1995, Ms. Acosta called the company and left a message on the answering machine that she was going to physical therapy. The company contends that she said she would report to work after physical therapy. Ms. Acosta contends that she said that she would report to work after physical therapy if she felt better. After the physical therapy session, Ms. Acosta neither reported to work nor called in that she did not intend to work. Because Ms. Acosta had in the past faithfully called in to report her absences, the Appeals Board finds that she was not aware that the company required her to call a second time following physical therapy to report that she was not intending to work.

(10) Ms. Acosta worked all day on October 24, 1995. On that day her supervisor told her to call the company a second time after a physical therapy appointment when she was not coming to work. The supervisor did not mention termination. Also on that date, National Beef received Ms. Acosta's claim for workers compensation benefits.

(11) On October 25, 1995, after working most of the day, the company fired Ms. Acosta for failing to call in after her physical therapy appointment on October 23.

(12) The Assistant Director averaged the functional impairment ratings provided by Drs. Koprivica and Brown to find that Ms. Acosta has an 8.5 percent whole body functional impairment. The Appeals Board adopts that conclusion.

(13) Both Drs. Brown and Koprivica testified regarding Ms. Acosta's tasks loss. Reviewing a list of eight tasks prepared by vocational rehabilitation expert Karen Terrill, Dr. Brown testified that Ms. Acosta could no longer perform three, or 37.5 percent, of her former work tasks. Dr. Koprivica, on the other hand, testified that claimant could no longer perform four out of five, or 80 percent, of the former work tasks in the list prepared by vocational rehabilitation expert Monty Longacre. The Appeals Board finds Ms. Acosta has lost the ability to perform 59 percent of her former work tasks.

(14) After she was terminated, Ms. Acosta attempted to talk with the company's personnel department regarding her termination. But the company representatives refused to talk with her.

(15) Ms. Acosta has not worked since National Beef fired her on October 25, 1995. She initially received unemployment benefits and was required to look for work while drawing those benefits. But when Karen Terrill interviewed her in January 1997, Ms. Acosta had not looked for work since October or November 1996. The Appeals Board finds that Ms. Acosta has failed to prove that she has made a good faith effort to find appropriate employment after November 1, 1996. Although she initially looked for work to qualify for unemployment benefits, her job efforts have severely diminished. The Appeals Board is persuaded by the information provided by Karen Terrill that Ms. Acosta is not presently actively looking for work.

(16) Ms. Acosta retains the ability to earn $5.50 per hour or $220 per week. Mr. Longacre testified that Ms. Acosta retains the potential to earn $4.75 per hour or $190 per week. Karen Terrill testified that Ms. Acosta could earn between $5.50 and $6.00 per hour, or $220 - $240 per week. The Appeals Board finds Ms. Terrill's opinion the most persuasive and finds that Ms. Acosta retains the ability to earn $5.50 per hour or $220 per week. Comparing $220 to the stipulated average weekly wage of $504.75 yields a 56% difference.

CONCLUSIONS OF LAW

(1) This is another instance where a worker loses his or her job following a work-related injury before permanent work restrictions are provided, and where it is later discovered that the post-injury job that the company provided violates the permanent medical restrictions. Here, National Beef contends that it would have accommodated the permanent work restrictions if Ms. Acosta had not been fired for violating company rules. Therefore, the company contends Ms. Acosta's permanent partial general disability should be limited to her functional impairment rating. Conversely, Ms. Acosta contends the firing was unjust

and, therefore, her permanent partial general disability benefits should not be limited to the functional impairment rating.

(2) Because hers is an "unscheduled" injury, Ms. Acosta is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

(3) The case law interpreting K.S.A. 44-510e continues to develop. In Foulk[1], the Court held that a worker could not avoid the presumption of no work disability contained K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer had offered that paid a comparable wage.

(4) The Court took a further step in Copeland.[2] In that case, the Court held that workers must put forth a good faith effort to find appropriate employment after recuperating from their injuries or their loss of ability to earn wages will be used in the wage loss prong of the permanent partial general disability formula rather than their actual wage loss.

(5) An employer may terminate a worker because it cannot accommodate medical restrictions. But when the employer later offers an accommodated position that pays a comparable wage, the worker's permanent partial general disability benefits are limited to the functional impairment rating from that point forward. [3]

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] Cabrera v. Casco, Inc., 25 Kan. App. 2d 169, 959 P.2d 918 (1998).

(6) Likewise, workers' permanent partial general disability benefits are limited to the functional impairment rating when they voluntarily terminate a job that they are capable of performing that pays at least 90% of their pre-accident wage.[4]

(7) The Appeals Board has further interpreted K.S.A. 44-510e to require workers to make a good faith effort to retain their post-injury employment. The Board has held that workers who are performing accommodated work should advise their employer of any problems working within their medical restrictions and should afford the employer an opportunity to adjust the accommodations. And failing to provide an employer an opportunity to further accommodate is strong evidence of a lack of good faith.[5]

(8) The employer must also act in good faith. In providing accommodated employment to a worker, Foulk is not applicable where the accommodated job is not genuine,[6] within the worker's medical restrictions,[7] or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.[8]

(9) Because both employers and employees must act in good faith, terminations for violations of company rules do not necessarily invoke the public policy considerations of Foulk and Copeland to preclude a work disability absent a worker's bad faith.[9] And misconduct that occurs before the accident may be treated differently than misconduct that occurs after the injury as it cannot be said that the worker was attempting to manipulate the workers compensation claim.[10]

(10) Here, Ms. Acosta made a good faith effort to retain her employment with National Beef and was terminated over both disputed facts and company rules. Therefore, Foulk does not apply as Ms. Acosta has not refused to perform accommodated work.

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[4] Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* __ Kan. __ (1998).

[5] Chavez v. IBP, Inc., Appeals Board Docket No. 204,408 (January 1999); Hunsecker v. Enterprise Estates Nursing Center, Appeals Board Docket No.186,229 (December 1996).

[6] Tharp v. Eaton, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

[9] Lyday v. J. I. Case Company, Appeals Board Docket No. 205,329 (May 1997).

[10] Figueroa v. Excel Corporation, Appeals Board Docket No. 211,777 (June 1998).

(11) The Appeals Board concludes that Ms. Acosta made a good faith effort to find appropriate employment through October 1996. But she has not proven a good faith effort to find employment for the period following November 1, 1996. Therefore, Ms. Acosta has a 100 percent actual wage loss for the period from October 26, 1995, through October 31, 1996, and a 56 percent wage loss after that date as computed in the findings above.

(12) Through Ms. Acosta's last day of work on October 25, 1995, Ms. Acosta did not have any wage loss as she continued to work for National Beef. Therefore, her permanent partial general disability benefit is limited to her functional impairment rating for the period from September 8, 1995, through October 25, 1995. From October 26, 1995, through October 31, 1996, the 100 percent wage loss and 59 percent tasks loss are averaged to produce an 80 percent permanent partial general disability. For the period commencing November 1, 1996, the 56 percent wage loss and 59 percent tasks loss are averaged to produce a 58 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board modifies the Award dated March 19, 1998, entered by Assistant Director Brad E. Avery as follows.

Victoria Acosta is granted compensation from National Beef Packing Company, L.P. and its insurance carrier for a September 8, 1995 accident. Ms. Acosta is entitled to receive .43 weeks of temporary total disability benefits. For the period from September 8, 1995, through October 25, 1995, 6.28 weeks of permanent partial general disability benefits are due and owing for an 8.5% permanent partial general disability. For the period from October 26, 1995, through October 31, 1996, 53.14 weeks of permanent partial general disability benefits are due and owing for an 80% permanent partial general disability. For the period commencing November 1, 1996, 181.28 weeks of permanent partial general disability benefits are due for a 58% permanent partial general disability. Based upon a $504.75 average weekly wage, Ms. Acosta is entitled to receive .43 weeks of temporary total and 240.7 weeks of permanent partial disability compensation at $326 per week totaling $78,608.38.

As of January 31, 1999, .43 weeks of temporary total and 177.29 weeks of permanent partial general disability compensation, both totaling $57,936.72, are due and owing, less any amounts previously paid. The remaining balance of $20,671.66 is ordered paid for 63.41 weeks at the rate of $326 per week until fully paid or further order of the Director.

The Appeals Board adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director